SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

October Term, 1969
No. 1178

UNITED STATES,

Petitioner,

vs.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO,

Respondent.

Brief of the State of California as Amicus Curiae in Support of the District Court in and for the County of Eagle and State of Colorado

The State of California, by and through its Attorney General, files this Amicus Curiae brief in support of the District Court in and for the County of Eagle and State of Colorado.

Interest of Amicus

The questions raised in this matter are of great importance in the administration and adjudication of water rights throughout the western United States.

The United States in the State of California, as in most of the western states, owns large portions of the lands within the state. The claim of water rights by the federal government resulting from the ownership of such lands must be considered in the overall planning and development of the State of California. This is

particularly true in the relatively arid and faster growing portions of the southern portion of the state.

A general adjudication of water rights to establish all demands upon a limited supply is the basic legal means of aiding in this vital resource planning.

The scope of the waiver of sovereign immunity to allow general adjudication of water rights claimed by the United States set forth in the McCarran Amendment (43 U.S.C. 666), the essential question presented to the Court in this case, is, therefore, of prime concern to the State of California. Rational resource planning cannot occur unless the rights of all parties, including the United States, to the resource are known. The interpretation of the District Court and of the Supreme Court of the State of Colorado holding that the United States must adjudicate its claims to portions of a stream system and to "reserved rights" correctly construes the McCarran Amendment. Only by such a construction can the result intended, comprehensive planning and development based upon practical and reasonable hypotheses, proceed. There are few matters of larger import to the State of California.

Questions Presented

1. Does the McCarran Amendment waive sovereign immunity only when an entire river system is adjudicated at once?

2. Assuming an adjudication to be within the waiver of immunity contemplated by the McCarran Amendment, must that adjudication ignore and exclude a determination of the United States claims of reserved water rights?

Summary of Argument

Review of the opinion of the Supreme Court of the State of Colorado and of the documents filed by the parties indicates extensive briefing of the legislative history and interpretative background of the McCarran Amendment. Amicus can add little but repetitive support to these arguments of respondent and does not, therefore, burden the Court with that repetition.

Similarly, the question of the nature of a "supplemental proceeding" under the Colorado law as a general adjudication would appear best left to the parties. Amicus, based upon its knowledge of such proceedings, believes that they are intended to establish water rights and priorities between claimants to a water source and are thus "general" within the meaning of the Court in *Dugan v. Rank*, 372 U.S. 609 (1963). *See* as to the general nature of the Colorado water right adjudication, 1 Clark, *Waters and Water Rights*, § 23.1, pp. 124-25.

Finally, both parties appear to agree that immunity is waived as to a "general adjudication" and that a "general adjudication" is one in which the rights of claimants to a water source are adjudicated *inter sese*. Amicus concurs.

Assuming *arguendo* that the proceeding involved herein is a general adjudication, two questions remain:

1. Does the McCarran Amendment waive sovereign immunity only when an entire river system is adjudicated at once?

2. Assuming an adjudication to be within the waiver of immunity contemplated by the McCarran Amendment, must that adjudication ignore and exclude a determination of the United States' claims of reserved water rights?

Amicus contends that the McCarran Amendment waives immunity in an adjudication of water rights' claims *inter sese* within any determinable unit, whether that unit be the whole or a portion of a river system. Amicus further asserts that since an adjudication exclusive of "reserved rights" would render such litigation and the McCarran Amendment utterly valueless, reserved rights are clearly within the scope of rights intended to be determined under the McCarran immunity waiver.

ARGUMENT

I

The McCarran Amendment (43 U.S.C. 666) Waives the Sovereign Immunity of the United States in Any Case in Which There Is a "General Adjudication" of Rights Within a Determinable Unit

The McCarran Amendment was intended to require the participation of the United States in any action to generally adjudicate water rights. Senate Report No. 755, 82d Cong., 1st Sess., p. 9 (1951); 97 Cong. Rec. 12947-48 (1951); 98 Cong. Rec. 122 (1952). To achieve the intent of Congress, the Amendment must be held to apply to any action in which there is an adjudication of a unit in which both supply and demands can be fixed *inter sese* (hereinafter referred to as a "determinable unit"), whether or not that unit is an entire river system.

General adjudications of water rights have but one purpose. Recognizing that water is a limited commodity, the adjudication attempts to define the rights and priorities of claimants to the supply.

> "All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the tes-

timony of witnesses with its recognized infirmities and uncertainties; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators." *Pacific Live Stock Co. v. Oregon Water Board,* 241 U.S. 447.

The problem presented by an adjudication is largely an accounting one. Supply must be ascertained to adjust demands. Demands must be known to apportion supplies with appropriate priorities. Obviously, then, both supply and demand must be clearly known and delienated.

The question presented in this matter is simply the size of the area which must be litigated in a single action for the waiver of immunity to be effective.

The position of the United States is that the McCarran Amendment waives soverign immunity in nothing less than a full river system adjudication. (United States Brief, pp. 27-28.) Taking this premise, to adjudicate a water right of the United States on lands adjacent to the Rush River, near Martell, Pierce County, Wisconsin, under the waiver of the McCarran Amendment, water rights of owners in Addis, Louisiana, would have to be included. The Rush River is part of the Mississippi River system. To adjudicate Water District 37, Colorado, involved in the instant case, one must also proceed to determine rights in Yuma, Arizona. Such an interpretation is patently unreasonable, if not absurd, and obviously renders the McCarran Amendment ineffectual. Such a construction must be avoided:

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by

> which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. *When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole,' this Court has followed that purpose, rather than the literal words." United States v. American Trucking Ass'ns.*, 310 U.S. 534, 543 (1940). (Emphasis added.)

The result urged by the United States, based upon the largest conceivable construction of the words "river system" is not only at variance with the clear policy and purpose of the McCarran Amendment, but ignores a perfectly rational and feasible interpretation of the statute.

The logical interpretation of the McCarran Amendment is that a waiver of sovereign immunity applies to the adjudication of any unit of a river system as to which an acceptable accounting of supply and demand can be made. This concept of determinable unit adjudications is sound and accepted, both as a matter of law and engineering. Engineering experts have long divided drainage systems in hydrologic units for purposes of water supply analysis. Hirshleifer, Dehaven, and Milliman, *Water Supply, Economics, Technology, and Policy*, § 3, p. 17. Such units can be defined because of physical features as surface or underground barriers to

water passage which allow the unit to be isolated for purposes of supply and demand accounting. The courts have generally adjudicated water rights within boundaries delineated by legal concepts, with or without a co-existent physical marker. In the leading case of *Pasadena v. Alhambra,* 33 Cal. 2d 908, 921-23, the court found a groundwater basin to be separately adjudicable. In *Miller v. Jennings,* 243 F.2d 157, 159, the court indicated that a general adjudication could result among those only on the Upper Rio Grande. In *Arizona v. California,* 373 U.S. 546, this court entertained essentially a general adjudication of the Lower Colorado River Basin. Thus there can be no doubt of the efficacy of adjudicating that portion of a stream requiring such a supply and demand determination wthout adjudicating the whole. When there are two constructions of an act, one which allows the policy to be operative, and the other which would render the legislation valueless, the former should be accepted. "There is a presumption against a construction which would render a statute ineffective or inefficient . . . ." *Bird v. United States,* 187 U.S. 118, 124; *See Knapczyk v. Ribicoff,* 201 F. Supp. 283, 286 (N.D. Ill. 1962).

Ignoring the enormous jurisdictional problem, the impossible mechanical problems, the undermining of the express policy and purpose of the McCarran Amendment, there is a further reason to construe the Amendment to compel federal participation in the adjudication of any determinable unit of a water supply. Obviously

not all portions of a full hydrological unit develop uniformly and at the same time. Sub-units, divisible either legally or hydraulically, should be adjudicated when necessary, and neither before nor after. Requiring adjudication of 1,000 miles of river, or more, the inevitable result of the United States construction, will involve hundreds of claimants in adjudications when their unit may be either far from ripe or far-overripe. Clearly this result should be avoided.

To construe the statute to require adjudication of an entire basin renders the McCarran Amendment a nullity, creates an absurd result, and could impose costly and wasteful litigation on those who do not require an adjudication. To hold that the statute is applicable to waive sovereign immunity as to individual determinable units makes the statute a useful and rational tool for the development of state and national water use planning. There should be no question as to the reasonable intent of Congress and interpretation of the act.

The United States' final attempt to rationalize their position is that the interpretation urged herein would subject them to continual litigation. But the government's burden is directly proportional to their land holdings and water claims, a problem which all landowners of great size must face. The Court would not accept the argument that because one of the government's parcels is involved in a quiet title action, all of its property must be included. The Government's contention as to water rights is substantially identical.

II

The McCarran Amendment Waives Sovereign Immunity as to Reserved Rights

The reserved rights of the United States are subject to adjudication under the McCarran Amendment.

As noted, *supra*, the purpose of a water adjudication, and of the McCarran Amendment, is to adjust supply and demand as to *all* claimants within a determinable unit. Realistic water planning requires that all demands be identified and quantified. This fact was repeatedly voiced in debates concerning the McCarran amendment.

> "S. 18 . . . is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. *This is so because unless all of the Parties owning or in the process of acquiring water rights in a particular stream can be joined as parties defendant, any subsequent decree would be of little value.*" Senate Report No. 755, 82nd Cong., 1st Sess., p. 9 (1951). (Emphasis added.)

Senator McCarran stated:

> "If one or the other of the owners of the rights cannot be joined, the effect of the decree is obvious. Since the United States has not waived its immunity in cases of this nature, suits for the adjudication of water rights necessarily come to a standstill, and confusion results.
>
> "The necessity that all owners or claimants of water rights on a given stream be joined in a suit for the adjudication of water rights is conceded.

. . . I direct attention to this point to show that the Department of Justice admits that in order to get a proper and complete adjudication of the water rights of a given stream or water source, it is necessary to join all the parties having or claiming to have an interest in the waters of said steam." 97 Cong. Rec. 12948 (1951).

The committee report provided:

"In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Congress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State

> law are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity." 98 Cong. Rec. 122 (1952).

Clearly, the Congress recognized keenly that one claimant free from the effects of an adjudication can render an adjudication null. Yet the interpretation urged by the United States would ignore this point, repeatedly made by the Congress, and thus emasculate 43 U.S.C. 666. In every western state, the United States holds vast parcels with reserved rights. To hold these free from adjudication causes a perpetual cloud on reasonable water management through adjudications, the very end sought by the McCarran Amendment.

The United States contends that the water rights to be adjudicated under the McCarran Amendment waiver are solely those which the United States acquires under state law, and that reserved rights are not obtained pursuant to state law and thus are exempt from the waiver. But the Amendment offers two situations in which immunity is waived:

> "(1) for the adjudication of rights to the use of water of a river system or other source, *or* (2) for the administration of such rights, *where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law. . . .*" 43 U.S.C. 666. (Emphasis added.)

The United States appends the condition of acquisition under state law to the first alternative as well as to the second.

While such a construction is possible, it is equally possible that that clause is linked solely to the second alternative.

> "We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.' " *Richards v. United States,* 369 U.S. 1, 11 (1962).

There can be no question but that the latter interpretation achieves the statutory intent, while the former ignores the clear purpose of the Amendment.

This interpretation is reinforced by the second sentence of 43 U.S.C. 666. That sentence states:

> "The United States, when a party to any such suit, shall be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty. . . ."

As reserved rights result as the result of sovereignty, the authors provided that the right to plead such sovereignty as a defense to an adjudication is lost. Thus the reserved rights may be determined by the Court.

The United States appears to argue that by submitting their reserved rights to the State Court, they may be subject to the rules of appropriation and thus may not be able to perfect water rights for their land ownerships. Assuming *arguendo* the existence of a "reserved right," amicus does not understand this to be the law.

In *Arizona v. California*, 373 U.S. 546, 598-601, this Court held that these rights are subject to *quantification* by the Court based upon appropriate estimates of future needs, regardless of whether actual use in that amount has occurred on federally-owned lands. The mere fact that the Court has quantified these rights to affix a demand for resource development is a useful and desirable end for resource development.

Conclusion

Amicus respectfully submits that the McCarran Amendment waives the sovereign immunity of the United States as to any determinable unit subject to a general adjudication and that as part of such an adjudication, the reserved rights of the United States may in fact be qualified. The decision of the Court below should, therefore, be affirmed.

Dated: June 12, 1970.

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